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INTELLIGENCE IDENTITIES PROTECTION ACT

AUGUST 1, 1980.—Ordered to be printed

Mr. BOLAND, from the Permanent Select Committee on Intelligence, submitted the following

REPORT

[To accompany H.R. 5615]

The permanent Select Committee on Intelligence, to whom was referred the bill (H.R. 5615) to amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain U.S. intelligence officers, agents, informants, and sources, having considered the same, report favorably thereon with an amendment and recommend that the bill do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Intelligence Identities Protection Act".

SEC. 2. (a) The National Security Act of 1947 is amended by adding at the end thereof the following new title:

"TITLE V—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

"DISCLOSURE OF IDENTITIES OF CERTAIN UNITED STATES UNDERCOVER INTELLIGENCE OFFICERS, AGENTS, INFORMANTS, AND SOURCES

"SEC. 501. (a) Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

"(b) Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

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"(c) Whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States, discloses, with the intent to impair or impede the foreign intelligence activities of the United States, to any individual not authorized to receive classified information, any information that identifies a covert agent knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

"DEFENSES AND EXCEPTIONS

"SEC. 502. (a) It is a defense to a prosecution under section 501 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

"(b)(1) Subject to paragraph (2), no person other than a person committing an offense under section 501 shall be subject to prosecution under such section by virtue of section 2 or 4 of title 18, United States Code, or shall be subject to prosecution for conspiracy to commit an offense under such section.

"(2) Paragraph (1) shall not apply in the case of a person who acted in the the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States.

"(c) In any prosecution under section 501(c), proof of intentional disclosure of information described in such section, or inferences derived from proof of such disclosure, shall not alone constitute proof of intent to impair or impede the foreign intelligence activities of the United States.

"(d) It shall not be an offense under section 501 to transmit information described in such section directly to the Select Committee on Intelligence of the the Senate or to the Permanent Select Committee on Intelligence of the House of Representatives.

"PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND AGENTS

"SEC. 503. (a) The President shall establish procedures to ensure that any individual who is an officer or employee of an intelligence agency, or a member of the Armed Forces assigned an officer, employee, or member agency, whose identity as such an officer, employee, or member is classified information and which the United States takes affirmative measures to conceal, is afforded all appropriate assistance to ensure that the identity of such individual as such an officer, employee, or member is effectively concealed. Such procedures shall provide that any department or agency designated by the President for the purposs of this section shall provide such assistance as may be determined by the President to be necessary in order to establish and effectively maintain the secrecy of the identity of such individual as such an officer, employee, or member.

"(b) Procedures established by the President pursuant to subsection (a) shall be exempt from any requirement for publication or disclosure.

"SEC. 504. There is jurisdiction over an offense under section 501 committed ouside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permament residence (as defined in section 101(a)(20) of the Immigration and Nationality Act).

"PROVIDING INFORMATION TO CONGRESS

"SEC. 505. Nothing in this title shall be construed as authority to withhold information from Congress or from committee of either House of Congress.

"DEFINITIONS

"SEC. 506. For the purposes of this title:

"(1) The term 'classified information' means information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

"(2) The term 'authorized', when used with respect to access to classified information, means having authority, right, or permission pursuant to the provisions of a statute, Executive order, directive of the head of any department or agency engaged in foreign intelligence or counterintelligence activities, order of a United States court, or provisions of any Rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

"(3) The term 'disclose' means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available.

"(4) The term 'covert agent' means—

"(A) an officer or employee of an intelligence agency or a member of the Armed Forces assigned to duty with an intelligence agency—

"(i) whose identity as such an officer, employee, or member is classified information, and

"(ii) who is serving outside the United States or has within the last five years served outside the United States;

"(B) a United States citizen whose intelligence relationship to the United States is classified information and—

"(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or

"(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or

"(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified and who is a present or former agent, of or a present or former informant or source of operational assistance to, an intelligence agency.

"(5) The term 'intelligence agency' means the Central Intelligence Agency, the foreign intelligence components of the Department of Defense, or the foreign counterintelligence or foreign counterterrorist components of the Federal Bureau of Investigation.

"(6) The term 'informant' means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure.

"(7) The terms 'officer' and 'employee' have the meanings given such terms by sections 2104 and 2105, respectively, of title 5, United States Code.

"(8) The term 'Armed Forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

"(9) The term 'United States', when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.".

(b) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

"TITLE V—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

"Sec. 501. Disclosure of identities of certain United States undercover intelligence officers, agents, informants, and sources.
"Sec. 502. Defenses and exceptions.
"Sec. 503. Procedures for establishing cover for intelligence officers and employees.
"Sec. 504. Extraterritorial jurisdiction.
"Sec. 505. Providing information to Congress.
"Sec. 506. Definitions.".

INTRODUCTION

A critical need for the effective conduct of U.S. foreign and defense policy is the production and analysis of high quality intelligence information. Further, U.S. policy interests and involvement have expanded in both these areas so that the demand for intelligence has also increased dramatically. The President and an ever larger group of high-level policymakers want an increasingly sophisticated, highly specialized flow of information on such broad-ranging topics as strategic force structure, nuclear proliferation, international terrorism, oil pricing

policies, drug trafficking, Third World economic growth, and the Iranian hostage crisis—not to mention the activities of hostile intelligence services.

As critical as the need for finished intelligence products is the need for the means to collect intelligence. A variety of methods—some highly technical and sophisticated—are employed by the U.S. intelligence community for this purpose. Notwithstanding the essential contribution of these systems, however, there continues to be a need for traditional human intelligence collection. Without the often unique contribution of human collectors—undercover intelligence operatives and those who aid them—the U.S. Government would be without needed insights into the actual plans and intentions of foreign powers it must confront or the international problems it must solve. Further, as the United States seeks to implement its foreign policy objectives, it requires in unusual and important situations the capability to use clandestine operators to compliment its overt policy initiatives.

Intelligence operatives have aways faced risks from exposure. Espionage is criminal activity in the country in which it occurs. In many countries today, to the threat of expulsion or imprisonment for spying must be added the possibility of terrorist attack targeted on intelligence operatives who are exposed as such. Thus U.S. intelligence operatives are provided protection in the form of alias identification and disguise. They in turn conceal through thadecraft their relationship to those from whom they seek information or assistance in carrying out their intelligence assignments. Such arrangements—cover and candestine means of communication—are employed by all intelligence services throughout the world. They seek to protect the viability of the intelligence services' operations and the personal safety of their officers and agents. In the process, they avoid the embarassment exposure would bring to the countries on whose behalf these services operate.

The exposure of a U.S. intelligence officer abroad aways carries with it the loss or diminution of that officer's cover, with a concommitant loss in his effectiveness as a secret operative for his Government. Further, in some circumstances, his life or the lives of his family may be jeopardized. These results are always harmful to U.S. interests since, beyond these most basic divadvantages, such an exposure embarasses the U.S. Government and may complicate its relations with another government while demoralizing, or resulting in the loss of, the officer. Yet such exposures sometimes occur and it is a measure of the resiliency of an intelligence agency in how it adjusts to such setbacks.

It is more than a setback, however, when undercover intelligence operatives become the target of repeated, systematized exposures by individuals or groups bent on the production of all the above enumerated effects and with the goal of destroying this essential U.S. intelligence capability. Yet, such has been the experience of the Central Intelligency Agency in recent years. Individuals—former employees among them—and several publications have taken it upon themselves to discover and disclose wholesale the identities of undercover CIA and other intelligence officers and those foreign nationals with whom they work.

Further, the motivation for these acts has been advanced clearly and repeatedly—that exposure of all U.S. intelligence operatives will pre-

vent them from performing their duties and thereby render powerless the agencies for which they work.

These activities have been successful to a point. They have resulted in the loss—measured in terms of training, expertise, morale and expense—of seasoned clandestine officers and valuable agents of U.S. intelligence agencies. That loss in turn has affected adversely the flow of intelligence necessary for the formulation of U.S. policies. Lamentably, the clear indication has been that an exposure of undercover CIA officers has played a part in attacks on the lives of those individuals. In one tragic instance, the attack was fatal. In many more cases, harassment, threats and the fear of them have taken their toll on other exposed officers and their families.

In the opinion of the committee, the unauthorized disclosure of the names of undercover intelligence agents is a pernicious act that serves no useful informing function whatsoever. It does not alert us to abuses; it does not further civil liberties; it does not enlighten public debate; and it does not contribute one iota to the goal of an educated and informed electorate.

Whatever the motives of those engaged in such activity, the only result is the disruption of our legitimate intelligence collection programs—programs that bear the imprimatur of the Congress, the President, and the American people. Such a result benefits no one but our adversaries.

Moreover, disaster, or its stepchild terror, stalks those whose lives have been troubled by this campaign of disruption. It is the opinion of the committee that it is enough that covert agents must expect a life of adversity as a result of their calling. The Congress and the American people cannot ask them and their many colleagues to continue to travel the secret ways of the world's capitals without a recognition and a response to the perils they face and can ill avoid.

It is in this context that the committee has considered and marked up H.R. 5615. The bill criminalizes disclosure of intelligence identities as a direct result of the committee's conclusion that such disclosures harm the Nation's ability to conduct foreign policy and provide for the common defense and that disclosure can place in jeopardy or severe apprehension of harm dedicated and loyal men and women who serve their country in a difficult and dangerous profession.

Summary of Legislation

Although the committee condemns witting disclosures of undercover intelligence identities, it does not seek to criminalize such acts in every context. The committee recognizes fully that the bill's proscriptions operate in an area fraught with first amendment concerns and has limited its scope in order to criminalize only those disclosures which proceed in violation of an express duty of care assumed by the discloser or where the disclosure occurs in the context of a pattern or practice of identification and disclosures intended to impair U.S. intelligence capabilities.

Thus, the bill applies to three well defined and limited classes of individuals. The first consists of those who have had authorized (that is, officially recorded) access to classified information identifying un-

dercover operatives, or "covert agents", as they are termed by the bill. This class would include only those individuals—principally Government coworkers or supervisory officials—who would have had a need to know the identity of an undercover officer or an agent. This class therefore includes only those who have undertaken never to reveal information to which they have been given access. Their promise of secrecy was the reason for their being provided access to the identities of covert agents, and disclosures—and disclosures alone—of the identities they learned in this fashion are the most heavily penalized by the bill.

The second class of individuals also includes those who have access to classified information, but not necessarily that which explicitly identifies covert agents. For a member of this class, however, it must be shown that as a result of that access to classified information be learned an intelligence identity. This class would include those in Government whose jobs place them in a position to meet or learn the identities of covert agents. Although the Government need not be able to prove that individuals in this class have had officially processed and approved access to the actual identities of covert agents, it must show that as a result of the position which they held they learned such identities. Within certain higher level circles of Government such circumstances are not uncommon. Since individuals in this class have also sworn to maintain the secrecy of classified information provided to them, they are believed by the committee to have a duty of care parallel to, but less than, that binding those individuals included in the first class. Thus, disclosures by the second class are penalized less severely than those of the first class but still more severely than the third class.

The third and last class of individuals affected by the bill are those who, although they never have had the kind of security clearance with its accompanying duty of care which typifies members of the first and second classes, engage in a deliberate effort or practice to identify and expose covert agents "with the intent to impair or impede the foreign intelligence activities of the United States" and whose disclosures are made with that same intent. Since this class potentially includes any discloser of an undercover intelligence identity, the committee has paid particular attention to limiting its embrace to those whose clear plan and practice is to identify and then place on the public record the secret identities of covert agents with the deliberate aim of disrupting a legitimate and highly valuable function of Government.

This class does not include those who, in disclosing a secret intelligence identity, merely voice criticism of, or display animus toward, intelligence agencies. Rather, they must be those whose intentional, well evidenced purpose it is to (1) identify and (2) expose covert agents (3) with the intent to impair or impede U.S. intelligence activities and (4) whose disclosure, the subject of the prosecution, must be made with the same intent to impair or impede.

It is the purpose of the committee in limiting the above class to thereby preclude the inference and exclude the possibility that any speech—be it casual discussion, political debate, the journalistic pursuit of a story on intelligence, the disclosure of illegality or impropriety in Government—other than that so described will be chilled by the enactment of the bill. Further, the bill also provides that no prosecu-

tions for conspiracy, aiding or abetting or misprision in the commission of an offense by a member of any of the three classes of individuals affected by the bill can occur unless the individual accused also evidenced, in the course of conduct, the intent to impair or impede the foreign intelligence activities of the United States.

Beyond its concern for narrowing the application of the bill to those whose duty of care or activities render disclosure criminal, the committee devoted great care in limiting the scope of the intelligence identities the disclosure of which should be criminalized. In so doing, the committee relied on three principles of selection. First, it required that identities, to be protected, must be properly classified. Second, the disclosure of the identity must produce the possibility of harm beyond the reasonable expectance of the U.S. Government to prevent. Last, the intelligence identity must be such that disclosure would likely reduce the individual's future effectiveness for intelligence purposes.

Using these criteria, the committee has fashioned the definitions of protected identities to include only covert agents of the CIA, intelligence components of the Department of Defense and the foreign counterintelligence and foreign counterterrorism components of the Federa Bureau of Investigation.

The committee further defines the term covert agent to include only three categories of individuals. The first group consists of present officers or employees or members of the armed services of the above named agencies serving outside the United States or those who professional involvement in clandetine operations will result in their serving overseas again. Such individuals all serve undercover, for example, using alias or disguise. Serving overseas, they cannot claim the protection of U.S. laws or the police power of the Government. Exposure broad or within 5 years from last returning abroad (a provision calculated to include those who may be home in the U.S. for a tour or a visit) could—as it has already—result in heightened danger for these individuals or their families. Clearly, it would diminish their effectiveness as clandestine operators.

The second category includes U.S. citizens who reside and act outside the U.S. as agents, informants or sources of operational assistance to an intelligence agency, or agents or informants of the FBI's counterintelligence or counterterrorism units wherever they may be. These individuals are those who, because of their operations overseas (although not necessarily continuous in span) or their involvement in the dangerous fields of counterintelligence or counterterrorism, could suffer severely because of public identification with a U.S. intelligence agency. In the case of the FBI agents or informants, even though they may be present in the United States, the nature of the individuals and groups with which they come into contact suggests strongly that physical danger is a part of their operational milieu.[1]

The identity of each such individual in this second category must be properly classified. This group of individuals is one whose importance to U.S. intelligence operations is real. The category has been

[1] The merits of the inclusion of these FBI personnel were brought out in an exchange of correspondence between Hon. C. W. Bill Young, a member of the committee, and Hon. William Webster, Director of the FBI.

defined in such a way as to exclude those U.S. citizens residing in the United States whose relationship with an intelligence agency may be concealed but who would suffer at most embarrassment from the disclosure of this relationship. The committee believes that physical danger or some reasonable expectation thereof serves as a good selector among others in shaping this and other categories of covert agents. Such a criterion serves to exclude relationships which public policy may wish to conceal but the protection of which does not require the onus of criminal sanctions.

The last category of covert agent consists of all aliens who serve, or who have served, as agents, informants or sources of operational assistance of intelligence agencies. To be included, their relationship must remain classified. The committee feels that this more broadly defined group also reflects the realities of life for an alien who has assisted a U.S. intelligence agency and who remains overseas or ever hopes to return to his country. Without the anonymity of silence about a present or past relationship with the U.S. Government, such individuals would neither continue the association nor—in some countries—hope to survive revelation of that relationship. The further ramifications of a public disclosure could include reprisals against family and friends, imprisonment or death.

In addition to the care with which the classes of individuals affected by the bill and those whose identities are to be protected have been defined, the committee has also devoted care to the other elements of the offense noted in H.R. 5615. All disclosures criminalized by the bill must be intentional, that is, the defendant must have consciously and deliberately willed the act of disclosure, the consequences of which he was fully aware. Further, the Government must prove that what he knew included the full realization that the sum of his acts was the disclosure of a protected intelligence identity, one which he knew the Government was taking affirmative steps to conceal. In effect, he must be shown to have known that he was disclosing an undercover relationship, one protected by the statute the bill would create.

The bill additionally creates an affirmative defense to the effect that no offense has been committed where the defendant can show that the Government has publicly acknowledged or otherwise publicly revealed the intelligence identity the disclosure of which is the subject of the prosecution.

The committee believes that it has considered and crafted the provisions of H.R. 5615 with care. Its simple purpose has been to prevent the disruption of legitimate, important intelligence operations while avoiding the proscription of merely critical or newsworthy publications. The principle thrust of this effort has been to criminalize those disclosures which clearly represent the conscious and pernicious effort to eliminate the capability to conduct intelligence operations. Yet the committee also recognizes that there is another aspect of this problem which requires a different solution.

The committee is compelled to note, although a full discussion of cover for intelligence operatives abroad is inappropriate in the context of this pbulic report, that provisions for the concealment of intelligence operatives are not fully adequate. Accordingly, the committee has included a provision requiring the President to promulgate pro-

cedures that will help to rectify this situation. These procedures are to ensure that intelligence cover agents are effective. They are to provide that departments and agencies of Government designated by the President are to afford all appropriate assistance—determined by the President—to this end.

This provision of the bill does not require the President to do anything not now being done about intelligence cover arrangements. It does not stipulate which elements of Government shall provide assistance or what that assistance must be. It requires only that the President of the United States review these questions and determine the appropriate interest of the United States. In so doing, the provision recognizes the fact that only the President has the authority and duty to truly resolve this question and only he will have the requisite detachment to make a decision that can result in the adequate provision of cover to undercover intelligence operatives.

Notwithstanding the above, and recognizing the fact of recent improvements, the committee notes that the reason for the inclusion of the cover provision in the bill stems from a grave concern shared by all members that insufficient foresight has led to the atrophy of U.S. Government policy in this area which does not contribute to the best possible U.S. intelligence effort. The committee feels constrained to say no more about this subject except to note that it will communicate its strong feelings in this regard directly to the President in hopes that current policies can be reexamined.

Conclusion

The committee does not pretend to believe that H.R. 5615 will solve all the problems associated with preserving undercover intelligence identities, nor, as noted above, would it be constitutionally or practically prudent to so. What H.R. 5615 represents is the committee's best judgment on a combination of provisions which, if implemented, will remove present dangers and those which are reasonably foreseeable. To critics of this carefully balanced approach this committee can only offer its belief that the bill's strictures and requirements are delicately poised. To be effective, the bill has criminalized the disclosure of information which the Government seeks to protect but which the defendant need not have acquired from classification (that is, formally protected) sources. To be reasonable, this same approach requires very explicit involvement in systematized identification and disclosure of covert agents with a similarly clear and pernicious intent. The choices involved allowed no resort to simple answers, no comfort in exclusive principle or authority, no hope in present alternatives. The committee strove to choose wisely. Careful application of the provisions of H.R. 5615 will insure the appropriateness of the choices made.

History of the Bill

H.R. 5615 was introduced by Mr. Boland, chairman of the Committee, on October 17, 1979. It was cosponsored by all the members of the committee.

In January of 1980, the Subcommittee on Legislation, with Mr. Mazzoli presiding, conducted two full days of hearings on H.R. 5615

and other proposals which would establish criminal penalties for the unauthorized disclosure of the names of undercover U.S. intelligence officers and agents. The subcommittee heard from the following witnesses:

Representative James C. Wright (D-Texas);
Representative Charles E. Bennett (D-Florida);
Hon. Frank C. Carlucci, Deputy Director of Central Intelligence;
Robert L. Keuch, Associate Deputy Attorney General;
William E. Colby, former Director of Central Intelligence;
Floyd Abrams, esq., Cahill, Gordon & Reindel;
Jack Blake, president, Association of Former Intelligence Officers;
Morton Halperin, Director, Center for National Security Studies;
John Shattuck, director, Washington Office, ACLU;
Jerry J. Berman, legislative counsel, ACLU;
Ford Rowan, assistant professor of journalism, Northwestern University;
M. Stanton Evans, political commentator and director, National Journalism Center;
William H. Schaap, coeditor, CovertAction Information Bulletin;
Ellen Ray, coeditor, CovertAction Information Bulletin; and
Louis Wolf, coeditor, CovertAction Information Bulletin.

On July 25, 1980, the full committee met to consider intelligence identities legislation. H.R. 5615, as amended, was approved by voice vote and ordered reported favorably.

Section-by-Section Analysis

Section 501—Disclosure of Identities

Section 501 establishes three distinct criminal offenses for the intentional disclosure to unauthorized persons of information identifying covert agents. The distinction among the offenses is based on the defendant's previous authorized access to classified information, or lack thereof. The greater the degree of such access, the greater is the duty of trust assumed by the defendant and the greater is the penalty for breach of such duty. In addition, the elements of proof are fewer against defendants with authorized access to classified information.

Section 501(a) applies to those individuals who have been given authorized access to classified information which identifies a covert agent. Such individuals, usually employees of the United States with the most sensitive security clearances, have by their own affirmative, voluntary action undertaken a duty of nondisclosure of the nation's most sensitive secrets. It is appropriate, in the committee's view, to impose severe penalties for the breach of this duty and to hold a defendant in such category to stricter standards of liability.

Therefore, an individual who has had authorized access to classified information identifying a covert agent would be subject to a fine of $50,000 or imprisonment for 10 years, or both, if he or she—

Intentionally discloses, to any individual not authorized to receive classified information, any information identifying such agent;

Knowing that the information disclosed identifies such agent; and

Knowing that the United States is taking affirmative measures to conceal the agent's intelligence relationship to the United States.

The word "intentionally" was carefully chosen to reflect the committee's intent to require that the Government prove the most exacting state of mind element in connection with section 501 offenses.[2]

It should be evident, but the committee wishes to make perfectly clear, that the words "identifies", "identifying", and "identity", which are used throughout section 501 are intended to connote a correct status as a covert agent. To falsely accuse someone of being a covert agent is not a crime under this bill.

The reference to "affirmative measures" is intended to narrowly confine the effect of the bill to relationships that are deliberately concealed by the U.S. Government.

The bill would apply to disclosure of an identity only where affirmative measures had been taken to conceal such identity, as, for example, by creating a cover or alias identity or, in the case of intelligence sources, by using clandestine means of communication and meeting to conceal the relationship involved. Proof of knowledge that the United States takes affirmative measures to conceal the relationship will depend upon the facts and circumstances of each case. Proof of knowledge could be demonstrated by showing that the person disclosing the information has or had an employment or other relationship with the United States that required or gave him such knowledge. It could also be demonstrated by statements made in connection with a disclosure or by previous statements evidencing such knowledge.

It also is to be emphasized that though the identity disclosed must be classified (see section 506(4)) the actual information disclosed need not be. For example, the phone number, address, or automobile license number of the CIA station chief in Ruritania is not classified information; the disclosure of such information in a manner which identifies the holder as the CIA station chief is an offense under the bill. However, the connection between the information disclosed and the correct identity of the covert agent must be direct, immediate, and obvious.

Finally, in connection with section 501(a), it should be noted that the identity which is disclosed and which is the subject of the prosecution must be an identity to which the offender, through authorized access to classified information, was specifically given access.

Section 501(b) applies to those who learn the identity of a covert agent "as a result of having authorized access to classified information". Basically, it covers those whose security clearance place them in a position from which the identity of a covert agent becomes known or is made known. For example, such a person could be one who worked at the same location as an undercover CIA officer. The distinction between this category of offenders, and the category covered by section 501(a), is that under section 501(a) the offender must have had authorized access to specific classified information which identifies the

[2] Lesser degrees of mental culpability are knowing, reckless, and negligent. See S. Rept. 96-553, pages 62-69 (Criminal Code Reform Act of 1979, Report of the Committee on the Judiciary, U.S. Senate, to accompany S. 1722.)

covert agent whose disclosure is the basis for the prosecution. Section 501(b), on the other hand, requires that the identity be learned only "as a result" of an authorized access to classified information in general.

As with those covered by section 501(a), those in the 501(b) category have placed themselves in a special position of trust vis-a-vis the U.S. Government. Therefore, it is proper to levy stiffer penalties and require fewer elements to be proved than for those who have never had any authorized access to classified information (see section 501(c)). However, the committee recognizes that there is a subtle but significant difference in the position of trust assumed between an offender within the section 501(a) category and an offender in the section 501 (b) category. Therefore, the penalty for a conviction under section 501(b) is a fine of $25,000 or 5 years imprisonment, or both.

With the two exceptions discussed above—the relationship of the offender to classified information and the penalty for conviction—the two offenses, and the elments of proof therefor, are the same.

Section 501(c) applies to any person who discloses the identity of a covert agent.

As is required by subsection (a) and (b), the Government must prove that the disclosure was intentional, that the relationship disclosed was classified, and that the offender knew that the Government was taking affirmative measures to conceal the intelligence relationship of the covert agent.

Furthermore, as is also the case with sections (a) or (b), the actual information disclosed does not have to be classified.

Unlike the previous two sections, authorized access to classified information is not a prerequisite to a conviction under section 501(c). An offender under this section has not voluntarily agreed to protect any Government information nor does he owe the Government any particular duty of nondisclosure. Therefore, section 501(c) establishes two elements of proof not found in sections 501(a) or (b). The United States must prove that—

> The disclosure was made in the course of an effort to identify and expose covert agents, which effort was undertaken with the intent to impair or impede the foreign intelligence activities of the United States; and
>
> The disclosure itself was made with such intent.

H.R. 5615, as introduced, required that to be criminal the disclosure made by those with no access to classified information would have to be made "with the intent to impair or impede the foreign intelligence activities of the United States." Both public and Government witnesses criticized this provision as too sweeping. They stated their belief that it could be used to punish journalists and others who wrote stories or spoke out about intelligence failures or wrongdoing or Government whistleblowers, even though the bill states in section 502(c) that the specific intent element cannot be proved solely by the fact of the disclosure itself.

As reported, the bill seeks to meet these criticisms by requiring that the disclosure must be "in the course of an effort to identify and expose covert agents with the intent to impair and impede the foreign intelligence activities of the United States." The added requirement that the disclosure be "in the course of an effort to identify and expose" undercover officers and agents makes it clear that the defendant must be engaged in a conscious plan to seek out undercover intelligence opera-

tives and expose them with the intent to destroy U.S. intelligence efforts. The defendant, in other words, has made it a practice to ferret out and then expose undercover officers or agents for the purpose of damaging an intelligence agency's effectiveness and the disclosure which is the subject of the prosecution must be made with that intent. It should be noted that, though in most cases an offense will require a series of disclosures, in some circumstances, where other evidence can demonstrate a plan or practice, one disclosure would be sufficient to establish an offense under this subsection. Whistleblowers, those who republish previous disclosures, and critics of U.S. intelligence would all stand beyond the reach of the law if they made their disclosures for purposes other than the impairment of U.S. intelligence activities.

A journalist writing stories about the CIA would not be engaged in the requisite "effort", even if the stories he or she wrote included the names of one or more covert agents, unless the Government proved that there was a specific effort to identify and expose agents and that this effort was intended to impair or impede. For example, an effort by a private institution to determine if, against its policy, an employee is also an employee or agent of an intelligence agency, would not be covered.

The Government, of course, can attempt to demonstrate such disclosures were made with the intent to impair or impede and in the course of an effort so intended. It would not be sufficient to show that the discloser had reason to believe that the release would impair or impede, rather the Government must show that that was the purpose of the disclosure.

Section 502—Defenses and Exceptions

Section 502(a) states that—

> It is a defense to a prosecution under section 501 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

This provision is intended to encompass such public activities as official publications of the United States, or official statements or press releases made by those acting on behalf of the United States, which specifically acknowledge or reveal an intelligence relationship. In addition, the United States has "revealed" an intelligence relationship if it has published information which directly and immediately identifies someone as a covert agent. An identification is not direct and immediate if it can be made only after an effort to seek out and compare, cross-reference, and collate information from several publications or sources.

Section 502(b) (1) and (2) insure that a prosecution cannot be maintained under section 501 (a), (b), or (c), upon theories of aiding and abetting, misprison of a felony, or conspiracy, against an individual who does not actually disclose information unless the Government can prove the "in the course of an effort" and the intent elements which are part of the substantive offense of section 501(c). A reporter to whom is leaked, illegally, the identity of a covert agent by a person prosecutable under section 501 (a) or (b) would most likely not possess the necessary intent or be engaging in the requisite course of conduct.

Section 502(c) states that

> In any prosecution under section 501(c), proof of intentional disclosure of information described in such section, or inferences derived from proof of such disclosure, shall not alone constitute proof of intent to impair or impede the foreign intelligence activities of the United States.

This provision is intended to require the Government, when attempting to prove the intent elements of section 501(c), to produce some evidence of intent in addition to the inferences that may be drawn from the fact of intentional disclosure. Thus the evidentiary rule that a person is presumed to intend the foreseeable consequences of his actions cannot be used as the sole basis to prove that the "effort" was undertaken with the requisite intent or that the disclosure was made with the requisite intent.

Section 502(d) is intended to make clear that disclosures made directly to the House or Senate Intelligence Committees are not criminal offenses.

Section 503—Procedures for Establishing Cover for Intelligence Officers and Employees

Section 503 requires the President to establish procedures to ensure that undercover intelligence officers and employees receive effective cover. To this end, the section also stipulates that the procedures shall provide that those departments and agencies of the government designated by the President to provide assistance for cover arrangements shall provide whatever assistance the President deems necessary to effectively maintain the secrecy of such officers and employees.

This provision of the bill does not require the President to do anything not now being done about intelligence cover arrangements. It does not stipulate which elements of Government shall provide assistance or what that assistance must be. It requires only that the President of the United States review these questions and determine the appropriate interest of the United States. In so doing, the provision recognizes the fact that only the President has the authority and duty to truly resolve this question and only he will have the requisite detachment to make a decision that can result in the adequate provision of cover to undercover intelligence operations.

Section 503(b) excepts the mandated regulation from any requirement for public disclosure. In lieu of such disclosure, the committee expects the regulations to be made available to the House and Senate Intelligence Committee. The committee would also note that it is not its intent that section 503 be interpreted to require or suggest that existing public regulations concerning use of clerics, academics, and media for cover be made secret.

Section 504—Extraterritorial Jurisdiction

This section is intended to remove any doubt of the Congress's intent to authorize the Federal Government to prosecute a U.S. citizen or permanent resident alien for an offense under section 501 committed outside of the United States.[3]

[3] For discussion of Congress's power to authorize such prosecution, see Notes, "Extraterritorial Jurisdiction—Criminal Law" 13 Harv. Int. Law Journal 347; "Extraterritorial Application of Penal Legislation," 64 Mich. Law Rev. 609; and Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. I, p. 69 (1970).

Section 505—Providing Information to Congress

This section is intended to make it absolutely clear that no provision of the legislation may be relied on in any manner by the executive branch as a basis for withholding information from the Congress.

Section 506—Definitions

Section 506(1) defines "classified information". It means identifiable information or material which has been given protection from unauthorized disclosure for reasons of national security pursuant to the provisions of a statute or Executive order.

Section 506(2) defines "authorized". When used with respect to access to classified information it means having authority, right, or permission pursuant to the provisions of a statute, executive order, directive of the head of any department or agency engaged in foreign intelligence or foreign counterintelligence activities, order of a U.S. court, or the provisions of any rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

Section 506(3) defines "disclose". It means to communicate, provide, impart, transmit, transfer, convey, pubish, or otherwise make available.

Section 506(4) defines "covert agent". The term encompasses three distinct groups. In the first group are officers or employees of (or members of the Armed Forces assigned to) an intelligence agency whose identity is classified and who are serving outside the United States at the time of the disclosure or have so served within the previous 5 years.

In the second group are U.S. citizens in the United States who are agents of, or informants or sources of operational assistance to, the foreign counterintelligence or counterterrorism components of the FBI, or U.S. citizens outside the United States who are agents of, or informants or sources of operational assistance to an intelligence agency. In each instance the intelligence relationship must be properly classified.

In the third group are present or former agents of an intelligence agency and informants or sources of operational assistance to an intelligence agency whose identity is classified and who are not U.S. citizens.

The committee intends the term "agent" to be construed according to traditional agency law. Essentially, an agent is a nonemployee over whom is exercised a degree of direction and control. A "source of operational assistance", on the other hand, is a nonemployee who is not subject to direction and control, but who supports or provides assistance to intelligence activities which are under direction and control.

The committee has given long and careful thought to the definition of "covert agent" and has included within it only those identities which it is absolutely necessary to protect for reasons of imminent danger to life or significant interference with legitimate and vital intelligence activities. Undercover officers and employees overseas are in special danger when their identities are revealed, as recent events indicate. In addition, U.S. intelligence activities are disrupted severely when the identity of an officer in the clandestine service is disclosed, even when he or she is temporarily in the United States for rest, training, or re-

assignment. Thus, the definition includes those intelligence agency officers or employees whose identities have a classified cover and who have served overseas within the previous 5 years.

Overseas agents and informants who are not U.S. citizens can expect instant retribution when their relationship to the United States is exposed. If they reside in the United States their relatives abroad are endangered. In both instances, important sources of information are denied by disclosure, and possible future sources are less forthcoming. For these reasons the bill protects the identities of foreign agents, informants and sources be they within or without the United States at the time of the disclosure.

The committee has carefully crafted H.R. 5615 to insure it does not chill or stifle public criticism of intelligence activities or public debate concerning intelligence policy. An example of such drafting is the manner in which the definition of "covert agent" treats U.S. citizens who are not intelligence agency officers or employees. If such individuals—informants or sources—reside and act outside the United States, the revelation of their relationship would expose them to immediate and serious danger, and so their identity is protected.

However, the physical danger element is much less, if present at all, within the United States. Furthermore, U.S. citizens residing within the U.S. who assist intelligence agencies, may be employees of colleges, churches, the media, or political organizations. The degree of involvement of these groups with intelligence agencies is a legitimate subject of national debate and intragroup discourse. Therefore, the bill, in establishing criminal offenses for disclosures of the identities of covert agents, includes U.S. citizens residing within the United States within the operative definition only if the citizen is an agent of or informant to the foreign counterintelligence or foreign counterterrorism components of the FBI. These components are especially significant in terms of the country's real national security interests and maintain particularly sensitive relationships with their agents and informants. Domestic agents and informants of the CIA or the DOD who are U.S. citizens are not included within the definition.

Section 506 (*5*) defines "intelligence agency". It means the Central Intelligence Agency, any foreign intelligence component of the Department of Defense, or the foreign counterintelligence or foreign counterterrorism components of the FBI.

Section 506 (*6*) defines "informant". It means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure. This definition, along with that of "covert agent", insures that the term "informant" does not include all possible sources of assistance or information, but is narrowly defined to bring within it a limited number of individuals whose identity is classified and whose relationship with an agency is or has been conducted on a regularized and ongoing basis as part of an established informant program.

Section 506 (*7*) defines "officer" and "employee" with the definition given such terms by section 2104 and 2105, respectively, of Title 5, United States Code.

Section 506 (*8*) defines "Armed Forces" to mean the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Section 506 (*9*) defines "United States". When used in a geographic sense it means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

Committee Position

On July 25, 1980, a quorum being present, the Permanent Select Committee on Intelligence approved H.R. 5615, with amendments, by voice vote and ordered that it be reported favorably.

Oversight Findings

With respect to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the committee notes that it has conducted an extensive investigation, which has included both public and executive session hearings, on the ability of the United States to keep secret the identities of its undercover intelligence officers and agents. The committee findings in this area have resulted in its recommendation that new legislation (H.R. 5615) be enacted. The committee's reasoning is set out in the body of this report.

Congressional Budget Act

Pursuant to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the committee notes that this legislation does not provide for new budget authority or tax expenditures.

Congressional Budget Office Estimate

Pursuant to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the committee notes that it has not received an estimate from the Congressional Budget Office under section 403 of the Congressional Budget Act.

Recommendation of the Committee on Government Operations

Pursuant to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the committee notes that it has not received a report from the Committee on Government Operations.

Inflation Impact Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the committee finds that enactment of H.R. 5615 will have no inflationary impact on prices or costs in the operation of the national economy.

Five-Year Projection

Pursuant to clause 7(a)(1) of rule XIII of the Rules of the House of Representatives, the committee has determined that no measurable additional costs will be incurred by the Government in the administration of H.R. 5615.

EXECUTIVE BRANCH ESTIMATES

The committee has received no cost estimates from the executive branch and is therefore unable to compare the Government's cost estimates with its own estimates pursuant to clause 7(a)(2) of rule XIII of the Rules of the House of Representatives.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

NATIONAL SECURITY ACT OF 1947

AN ACT To promote the national security by providing for a Secretary of Defense; for a National Military Establishment; for a Department of the Army, a Department of the Navy, and a Department of the Air Force; and for the coordination of the activities of the National Military Establishment with other departments and agencies of the Government concerned with the national security

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

That this Act may be cited as the "National Security Act of 1947".

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Sec. 503. Procedures for establishing cover for intelligence officers and employees.
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Sec. 506. Definitions.

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TITLE V—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

DISCLOSURE OF IDENTITIES OF CERTAIN UNITED STATES UNDERCOVER INTELLIGENCE OFFICERS, AGENTS, INFORMANTS, AND SOURCES

SEC. 501. (a) Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United

States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

(b) Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally disclosures any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

(c) Whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States, discloses, with the intent to impair or impede the foreign intelligence activities of the United States, to any individual not authorized to receive classified information, any information that identifies a covert agent knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

DEFENSES AND EXCEPTIONS

SEC. 502. (a) It is a defense to a prosecution under section 501 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

(b)(1) Subject to paragraph (2), no person other than a person committing an offense under section 501 shall be subject to prosecution under such section by virtue of section 2 or 4 of title 18, United States Code, or shall be subject to prosecution for conspiracy to commit an offense under such section.

(2) Paragraph (1) shall not apply in the case of a person who acted in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States.

(c) In any prosecution under section 501(c), proof of intentional disclosure of information described in such section, or inferences derived from proof of such disclosure, shall not alone constitute proof of intent to impair or impede the foreign intelligence activities of the United States.

(d) It shall not be an offense under section 501 to transmit information described in such section directly to the Select Committee on Intelligence of the Senate or to the Permanent Select Committee on Intelligence of the House of Representatives.

PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND AGENTS

SEC. 503. (a) The President shall establish procedures to ensure that any individual who is an officer or employee of an intelligence agency,

or a member of the Armed Forces assigned to duty with an intelligence agency, whose identity as such an officer, employee, or member is classified information and which the United States takes affirmative measures to conceal is afforded all appropriate assistance to ensure that the identity of such individual as such an officer, employee, or member is effectively concealed. Such procedures shall provide that any department or agency designated by the President for the purposes of this section shall provide such assistance as may be determined by the President to be necessary in order to establish and effectively maintain the secrecy of the identity of such individual as such an officer, employee, or member.

(b) Procedures established by the President pursuant to subsection (a) shall be exempt from any requirement for publication or disclosure.

EXTRATERRITORIAL JURISDICTION

SEC. 504. There is jurisdiction over an offense under section 501 committed outside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act).

PROVIDING INFORMATION TO CONGRESS

SEC. 505. Nothing in this title shall be construed as authority to withhold information from Congress or from a committee of either House of Congress.

DEFINITIONS

SEC. 506. For the purposes of this title:

(1) The term "classified information" means information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

(2) The term "authorized", when used with respect to access to classified information, means having authority, right, or permission pursuant to the provisions of a statute, Executive order, directive of the head of any department or agency engaged in foreign intelligence or counterintelligence activities, order of a United States court, or provisions of any Rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

(3) The term "disclose" means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available.

(4) The term 'covert agent" means—

(A) an officer or employee of an intelligence agency, or a member of the Armed Forces assigned to duty with an intelligence agency—

(i) whose identity as such officer, employee, or member is classified information, and

(ii) who is serving outside the United States or has within the last five years served outside the United States;

(B) a United States citizen whose intelligence relationship to the United States is classified information and—

(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or

(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or

(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency.

(5) The term "intelligence agency" means the Central Intelligence Agency, the foreign intelligence components of the Department of Defense, or the foreign counterintelligence or foreign counterterrorist components of the Federal Bureau of Investigation.

(6) The term "informant" means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure.

(7) The terms "officer" and "employee" have the meanings given such terms by sections 2104 and 2105, respectively of title 5, United States Code.

(8) The term "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(9) The term "United States", when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

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